

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH OFFICE**

**BETWEEN** Michael Murphy (Applicant)  
**AND** Steel & Tube New Zealand Limited (Respondent)  
**REPRESENTATIVES** Tony Wilton, Counsel for the Applicant  
Barry Dorking, Counsel for the Respondent  
**MEMBER OF AUTHORITY** Paul Montgomery  
**INVESTIGATION MEETING** 1 November 2006  
**DATE OF DETERMINATION** 12 April 2007

DETERMINATION OF THE AUTHORITY

***Employment relationship problem***

[1] The applicant, Michael Murphy, claims he was unjustifiably dismissed from his employment at the respondent's Blenheim Road steel store, following an altercation with a fellow employee. He seeks reinstatement to his former position or one similar, reimbursement of lost remuneration, compensation for hurt and humiliation and costs.

[2] The respondent denies the dismissal was unjustified, says that the decision to dismiss the applicant followed a thorough investigation of the matter, that at all material times the applicant had representation and declines to meet the remedies Mr Murphy wants.

[3] The parties attempted to resolve their differences in mediation but were unsuccessful.

***What caused the problem?***

*The incident*

[4] Mr Murphy worked in the plate processing section of the respondent's store and had been employed there for four years at the time of the dismissal. At that time, he was a delegate for the Amalgamated Engineering, Printing and Manufacturing Union (EPMU).

[5] On 6 December 2005, Mr Murphy was taking a cut plate job to the despatch area when he saw two pallets of plate steel had been poorly placed as the sharp ends were protruding some 300mm over the yellow line of the drive-through lane. Seeing this as a hazard, the applicant said he called out to Mr Fowler, a storeman, that it needed moving. The applicant said he thought Mr Fowler *probably put it there anyway*. He says Mr Fowler gave him the fingers and yelled some comments at him. The applicant took exception to this and approached Mr Fowler. Mr Murphy says:

*He (Mr Fowler) was between the racks in special steel. There were a pair of bolt cutters laying on the floor which I nearly tripped on. I picked them up and dropped*

*them at his feet making the comment that this is typical of his attitude about health and safety. We had words and only words there was no physical contact. It was over in 15 to 20 seconds or so. I picked up the bolt cutters and put them where they should have been. ... Went to Chris Millar's office ... Told him about the plate in the walkway also mentioned that Robert and myself had words. ... I returned to my work area where I loaded a piece (of steel plate) on the overhead crane raised it to about 3 metres and travelled about 7 metres when Robert came around the corner between the large plates, almost running, yelling abuse, waving his arms. I had the pendant remote in my left hand raised about shoulder height. Robert went to grab at my head. I threw out my right hand in a defensive movement coming into contact with his face. Robert jumped back and fell or tripped over. At no time did I let go of the remote or move from the spot I was at when he came at me. Lewis and Kevin arrived almost as it happened. Lewis had to restrain Robert who wanted to carry on yelling and I believe hit me.*

[6] Mr Fowler's view of events was:

*It all started when I went to Coral and said to her if the plate guy can bring their stuff they can cut to the despatch area. When Mike (Murphy) found out that I had gone to the office he got a little upset. Today (6 December 2005) when he got to work he told me to move some plate and I gave him the finger. Then he said to me "What did you do to me?" and grabbed a set of bolt cutters and barrelled me up between some racks of steel repeating the same words. So I called him a syco [sic] and he left grinning. I cut the piece of steel and put it into the trade shop and foolishly went to plate and told him not to speak to me again that way. I gave him a push (he was using the crane at the time) and he pushed back. I don't know if he hit me or not but I hit the floor. The boys from coil came over as well as Roy and broke it up. Then I went to the toilet and washed the blood off my face. I then went back to work.*

[7] No one witnessed both phases of the incident, however, Kevin Philbrick, a cutting machine operator, did see a significant exchange. He says:

*I had been setting a machine up about 40 metres from where Mike was. I turned around to walk up onto the console to rotate the about so that I could lower the blades, and as I walked up onto the console I stepped up about 18 inches. I glanced up towards the plate section and I saw Mike Murphy with his back to me and Robert Fowler (Chooky) standing facing Mike. The view I had over the stuff in between was probably from shoulder and head with helmets, and as I glanced up I saw Chooky's head go back and then he disappeared.*

[8] Mr Philbrick said he knew there had been an incident so set off to investigate, taking another cutting machine operator (Lewis) with him. He says they arrived at the scene in about 10 seconds. The witness goes on to say:

*When I got there Chooky was sitting on the ground and Mike was standing there looking down at him. Chooky was swearing a bit actually, he wasn't very happy. I can't remember the exact words but he said something like "he hit me" or something like that. And I think Mike said something like "you attacked me". And that's basically it.*

[9] Mr Philbrick finished his evidence by stating:

*Afterwards Chris (Millar) came a couple of times to ask me what I had seen. I have seen Chris' notes (document R). What is there is what I have said to him, and what I would have seen happen.*

[10] Mr Philbrick also confirmed when he first saw the two protagonists from the cutting machine console, the applicant was holding the dependent remote control for the crane and he was still holding it when he arrived at the scene.

*The respondent's investigation*

[11] The visit of the applicant to Mr Millar's office made the latter aware that the two employees had had *words* but as *there had been some unrest between Robbie and Mike in the previous few months, just small arguments, workplace stuff*, he did not regard the issue as anything unusual that would arouse concern.

[12] However, when Mr Millar sought Mr Fowler out to ask him to relieve in despatch, he discovered an injured employee. He says:

*I went out to the special steels area ... Robbie was bending down at the racks and I asked him if he could go down to despatch. He looked up at me and had a big fat lip, still quite bloody, and was holding a tissue, which still had blood on it. I asked him what had happened and I just felt there had been an incident. He said he didn't want to talk about it. I replied to Robbie that we needed to because if something had happened, regardless of whether he has banged himself, or something else had happened, he needed to report it so we could fix it and sort it out. At that point Robbie came back to the office with me and we went through the incident with him.*

[13] Having heard what Mr Fowler had to say about the incident, Mr Millar then advised Mr Donohue of the incident.

[14] Mr Millar had Mr Fowler checked by a staff member who had extensive first aid experience, and after taking his statement (in part set out above), had Mr Fowler taken home. The two managers then called Mr Murphy to the office to hear his side of the story. Mr Murphy wrote down his version of events and asked that, before he gave a copy of it to the managers, he speak to the EPMU representative. Mr Murphy was given an empty office to telephone the Union and while he was doing that, Mr Millar jotted down notes of what had been said in the meeting with the applicant.

[15] The two managers then spoke to the other staff to establish if anyone had witnessed the events. They established that while one employee had heard the verbal exchange in the special steels bay, only Kevin Philbrick had seen the final exchange.

[16] Mr Donohue and Mr Millar decided that it was prudent to suspend both protagonists on pay while the matter was investigated formally. Mr Millar said neither employee objected to that course of action.

[17] On 8 December 2005, Mr Donohue and Mr Millar met with Mr Fowler and his Union representative, Nicky Young, and later with the applicant and his representative, Wayne Ruscoe. Mr Donohue says:

*We repeated in both meetings that the company was treating this as being serious, and the worst case scenario was that the employees would be dismissed for fighting.*

[18] The applicant gave the respondent his written statement at this meeting.

[19] On 12 December, the respondent again met separately with the two employees and their representatives. The purpose was to go through the information they had gathered and there was some conflict regarding what each protagonist had said. Mr Donohue says:

*We gave Robert Mike's information and there was some cross-questioning because there was some conflict between what each of them had said. We went out into the work area to clarify a couple of the conflicts in the statement. And we followed the same process with Mike and Wayne Ruscoe. Mike commented that his hand was still bruised three days after the incident with Robert. Notes were kept of that meeting.*

*Then there was another meeting with the two Union representatives, Chris and myself just to discuss what other action might be taken and what outcome there might be. At the meeting the Union tabled the options of a warning and counselling for Mike and dismissal for Robert. From my point of view, Robert's facial injury, Mike saying about bruising on the back of his hand, and Kevin saying that he had seen Robert's head flick back, meant that there was as more [sic] than just the push which Mike had indicated – it must have been more of a striking and a forceful blow from Mike to Robert.*

*The way I saw it was that that [sic] there was a fight. Up until that point both parties had time to inform management that they had a complaint. Robert could have come to management and said that there was a big argument. Mike didn't make management aware that there was any real problem leading up to that, he had just told Chris that he and Robert had had words.*

[20] At para.20 of his statement in evidence, Mr Donohue said:

*Our company policy is clear, that any form of violence or intimidation on company premises is serious misconduct and is likely to lead to instant dismissal. I have a copy of the relevant policy (document L), and Mike Murphy's acknowledgment that he received a copy of the policy when he joined the company (documents M and N). I know there have been other dismissals around the country over the years for fighting.*

*Obviously everyone has a right to defend themselves if they are attacked, but that does not justify doing more than they have to to protect their own safety. Hitting another employee at all, let alone hard enough to knock him over, is fighting as far as I'm concerned regardless of who started it.*

[21] Further on, Mr Donohue states:

*Chris and I discussed the possible options, but in the end I decided that what had happened had been a fight, and that both Mike and Robert should be dismissed.*

[22] After referring his provisional decision to the Chief Executive and Head Office human resources to ensure he had proceeded appropriately, Mr Donohue advised the applicant of his dismissal.

### ***The issues***

[23] To determine this matter, the Authority needs to resolve the following issues:

- When did the applicant advise the respondent that his grievance was one of unjustified dismissal and that he sought reinstatement as a remedy; and
- Was the respondent entitled to replace the applicant in the circumstances; and
- Was the incident capable of being classified as serious misconduct under the CEA; and
- Did the respondent conduct a full and fair investigation into the incident; and
- Was the dismissal unjustified, and if so, what remedies are appropriate?

### ***The investigation meeting***

[24] At the investigation meeting the Authority was assisted by Mr Murphy and Mr Ruscoe from EPMU for the applicant. For the respondent, Mr Donohue, Mr Millar, Mr Fowler and Mr Philbrick gave evidence. All provided their evidence in an open and straightforward way and responded to questioning thoughtfully and honestly.

[25] Of great assistance was the attendance of Mr Fowler as it gave the Authority some insight into the personalities and demeanour of the two involved in the incident. The meeting was conducted efficiently and I thank counsel for assisting in this aspect of the investigation.

[26] The matter of the definition of the grievance alleged by the applicant came to light in the course of the investigation meeting. On 19 December 2005, Mr Ruscoe sent two letters to the respondent. The first one related to the notification of a personal grievance and a request for reasons for the dismissal. The second letter is headed:

*Re: Notification of personal grievance: Michael Murphy*

*I confirm the Union is representing Michael Murphy.*

*This letter is to ensure that you are aware, in terms of s.114 of the Employment Relations Act 2000, that Mr Murphy has raised a personal grievance which he wants you to address.*

*The nature of the grievance is that he has been disadvantaged in his employment by an unjustified action by his employer.*

*The grievance has arisen because:*

*The company has failed to pay Mr Murphy four weeks' pay in lieu of notice as required in the Steel & Tube collective agreement. This provision is clause 28.4 of the CA.*

*I will be in touch soon to make arrangements to discuss this matter. In the meantime I would be happy to receive and consider any written response you care to make.*

*Yours sincerely,*

*Wayne Ruscoe*

*District Organiser EPMU Christchurch*

[27] On 21 December 2005, Mr Donohue replied on behalf of the respondent. His letter reads:

*I refer you to your two letters dated 19 December 2005.*

*In one letter, you seek information about the reason for Mike Murphy's dismissal from our company. Please find attached a copy of the letter sent to Mike Murphy setting out the reasons for the decision.*

*In your other letter, you state that a grievance has arisen because we have failed to pay Mr Murphy four weeks' pay in lieu of notice as required by the Steel & Tube Holdings Limited collective employment agreement.*

*My head office has sought legal advice on this issue and we will respond as soon as it is available.*

*Yours sincerely,*

*Peter Donohue*

*Branch Manager*

*cc GM – Distribution (Central/Southern)*

*HR Manager*

[28] The second letter, dated the following day, again from Mr Donohue reads:

*I refer to your two letters dated 19 December 2005.*

*The company disagrees with your contention that Mr Murphy is entitled to pay in lieu of notice.*

*If you are seriously suggesting that an employee can be involved in a fight in the workplace and be summarily dismissed, then be paid notice, I have to wonder what possible basis you have for reaching this conclusion.*

*Your own organisation and our legal opinion agree that in cases involving summary dismissal, the employee is only entitled to wages and holiday pay up to the time of the dismissal.*

*I hope that this puts that matter to rest. If not, please direct any further communication to Steve Newby, HR Manager, Steel & Tube Holdings Limited, Private Box 30-543, Lower Hutt.*

*Yours sincerely,*

*Peter Donohue*

*Branch Manager*

[29] Mr Donohue says in his evidence:

*My original recollection when the statement of defence was filed was that we had replaced Mike before the mediation, but I see it was on 13 March 2006. I knew Mike and Wayne thought he shouldn't have been dismissed, and the problem would go away if we gave him his job back. But until recently, I'd always thought that Mike's grievance was that he hadn't been given proper notice.*

[30] In his evidence, Mr Ruscoe told the Authority:

*Before the matter went to mediation I discussed the matter with the company management. During those discussions I made it clear that we would be seeking reinstatement as well as reimbursement and compensation.*

[31] For the record, the parties attended mediation on 2 March 2006.

### ***Analysis and discussion***

[32] The starting point for the resolution of this matter lies in the relevant section of the collective employment agreement and the attached Company Policy Manual. On p.23 of the Company Policy Manual under the subheading *Serious Misconduct* the document states:

*Serious misconduct (defined as conduct that destroys or deeply impairs the trust that the company has placed with the employee) is likely to lead to instant dismissal.*

*Serious misconduct includes, but is not limited to, the following actions:*

- (s) Physical or verbal violence or intimidation against any person (for example other employees, customers or carriers) during working hours and while the employee is on Company premises or performing Company duties.*

[33] In his signed and witnessed acceptance of the agreement dated 5 November 2001, Mr Murphy agrees he has received a copy of the Company Policy Manual and agrees to be bound by its terms.

[34] On 27 May 2003, the applicant signed a section of the Company Policy Manual. That section is entitled *Termination of Employment* and sets out the respondent's disciplinary procedures and also the retirement, resignation and termination procedures. Under the disciplinary procedures heading, the document states:

*The company wishes to establish a fair procedure for the dismissal of employees. ... If your actions are deemed to amount to **serious misconduct**, you may be dismissed immediately without warning or notice.*

[35] The document then sets out some actions included in the definition of serious misconduct and repeats verbatim the quotation set out above.

[36] On the facts before the Authority, the respondent, having discovered the injured Mr Fowler, undertook what appears to have been a thorough and unhurried inquiry. It ensured both employees had adequate representation, acquiesced to Mr Murphy's request that he hold his statement until he had taken advice from the Union, and consulted the Union regarding possible remedies before coming to its decision.

[37] Mr Wilton, in his submission, takes issue with aspects of the respondent's inquiry, in particular submitting that, in respect of the actual striking of Mr Fowler by the applicant, the applicant's explanation was *plausible*. That may be so however, the employer was entitled to prefer the evidence of Mr Philbrick who was the only witness to this aspect of the incident. Also, it needs to be noted that in response to a question during the investigation meeting posed by counsel for the respondent as to whether Mr Murphy accepted that the documents accurately reflected the meetings he had attended, the applicant replied *yes*.

[38] The applicant says his reaction was one of defensiveness which I accept is probable. However, the force of Mr Murphy's reaction was considerable in that it knocked Mr Fowler over and caused significant lacerations to Mr Fowler's mouth and nose. Significantly, Mr Murphy's evidence in his statement to the company was, *at no time did I let go of the remote **or move from the spot I was at when he came at me***. That suggests strongly that Mr Fowler's push was of insufficient force to cause Mr Murphy to even take a step back.

[39] But in the last analysis, whether instinctively defensive or not, Mr Murphy struck Mr Fowler a solid blow. That in itself was capable of constituting serious misconduct under the company policy which Mr Murphy had agreed to abide by.

[40] A point of contention between the parties was whether there was one or two incidents. Having considered this matter, I am of the view that there was a definite concatenation of events.

[41] Firstly, the two fell out over Mr Fowler's speaking to Coral to have Mr Murphy take out plate to despatch himself. Then Mr Murphy wrongly assumed that Mr Fowler was responsible for the positioning of the plate steel some 300mm over the line. He accosted Mr Fowler. On Mr Murphy's own evidence, he upbraided Mr Fowler for Mr Murphy's view that Mr Fowler had a poor regard for health and safety procedures. Mr Fowler, having had, on Mr Murphy's evidence, a pair of bolt cutters thrown at his feet, reacted by giving Mr Murphy the *finger*.

[42] Some minutes later, having stewed on the last interaction, Mr Fowler decided to confront Mr Murphy to let him know he would not tolerate being spoken to in the manner Mr Murphy had spoken to him earlier. Unwisely, he approached Mr Murphy, a larger and stronger man, and pushed him while haranguing him about the earlier interaction.

[43] On any analysis, Mr Murphy struck out. I accept he did not *line up* Mr Fowler. Nonetheless, his reaction, even in self-defence, was excessive. He says himself he did not step back or consider the situation before responding.

[44] Mr Donohue, in his evidence, was very clear. Having considered the issues and information, and the input from the Union, he judged that there had been a *fight*. All definitions of a fight aside, Mr Donohue, as the decision-maker, had reason to make that

judgment and in the light of the company's policy, agreed to by Mr Murphy, to dismiss him summarily.

[45] For the sake of completeness, I need to record that Mr Fowler was dismissed for his part in this incident also.

### ***The determination***

[46] Returning to the issues the Authority outlined above in order to determine this case, I make the following decision.

[47] On the issue of when the applicant sought reinstatement, it is very clear that Mr Ruscoe, having formally raised the initial grievance in writing, did not formally notify the respondent of the change in the grievance alleged, nor in the remedies sought. I am unable to determine this aspect of the case as a matter of fact. However, little turns on this point.

[48] Given the informality of Mr Ruscoe's advice regarding reinstatement, particularly having raised a personal grievance of unjustified disadvantage which the respondent was entitled to rely on, the issue of Mr Murphy's replacement cannot be laid at the feet of the respondent.

[49] For the reasons expressed above, the behaviour of Mr Murphy was capable of being judged as serious misconduct under the terms of the agreement between the parties. A fair and reasonable employer would, in the circumstances, have dismissed the applicant.

[50] The investigation carried out by the respondent was full and fair. Its process was unhurried, it took pains to seek out witnesses and to ensure the applicant had opportunity to consult his Union before providing it with his statement and consulted with the Union in respect of penalty options before making its final decision.

[51] I find the applicant was not unjustifiably dismissed in all the circumstances of this case. The Authority is unable to assist Mr Murphy further in this matter.

### ***Costs***

[52] Costs are reserved. I encourage counsel to attempt to resolve this issue between themselves. If that cannot be achieved, leave is reserved to have the Authority determine the costs issue.

Paul Montgomery  
Member of Employment Relations Authority